IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 1875 of 2002

with

CRIMINAL REVISION APPLICATION No 105 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANJI LALJI VAGHANI

Versus

PRATAPSINH LAKHADHIRSINH JADEJA

Appearance:

1. Criminal Misc.Application No. 1875 of 2002
   MR NALIN K THAKKER for Petitioner No. 1
   MR MEHUL SHARAD SHAH for Respondent No. 1-7
   Mr V M Pancholi, APP for Respondent No. 8
2. Criminal Revision Application No. 105 of 2002
   MR MEHUL SHARAD SHAH for Petitioner No. 1
   Mr V M Pancholi, APP for Respondent No. 1
   Mr Nalin K Thakker for respondent no.2

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 06/09/2003

JUDGEMENT

The petitioner in Criminal Misc.Application No.1875/2002 who happens to be respondent No.2 in Criminal Revision Application No.105/2002, filed a criminal complaint being criminal complaint No.1457/96 before the learned Judicial Magistrate First Class at Bhuj in Kachchh district against the contesting respondents in the first matter and petitioners in the second matter for offences punishable under sections 427, 447, 504 and 506 of IPC.

2. The case of the said petitioner in the first matter and the second respondent in the second matter, who will be hereinafter referred to as the complainant before the trial court, may be briefly stated as follows:

That the contesting respondents in the first matter and the petitioners in the second matter who will hereinafter be referred to as the accused persons, demolished the house of the complainant and committed trespass in respect thereof. That they also gave threats and abuses to the complainant and committed the aforesaid offence. Process was issued and the accused persons appeared before the trial court. During the course of the trial, the accused persons submitted an application before the trial court stating that the offences alleged against the accused persons are such that the Court could not take cognizance of those offences without the previous sanction in accordance with the provisions of section 197 of the Criminal Procedure Code, 1973. The trial court found that there was no sanction which was necessary and, therefore the trial court directed that the proceedings against the accused persons be dropped and the accused persons were ordered to be discharged from the aforesaid offences in exercise of powers under section 258 of the said Code.

3. Feeling aggrieved by the said judgment and order of the trial court, the complainant preferred criminal revision application No.12/99 before the Sessions Court, Kachchh at Bhuj. The learned Sessions Judge heard the revision application and disposed it of on 20.12.2001. There the learned Sessions Judge found that so far as the offences under sections 447 and 427 of IPC are concerned, sanction was required and in absence of a valid sanction,

the court could not take cognizance. Therefore, the revision application was partly rejected with respect to the said two offence. So far as the offences punishable under sections 504 and 506 of IPC are concerned, the learned Sessions Judge found that these were the offences which had no connection with the official duties of the accused person and therefore, sanction was required under section 197 of the said Code. On the said findings, the learned Sessions Judge allowed the revision application and set aside the order of the trial court and directed the trial court to proceed ahead with criminal case No.1457/96 against the accused persons with respect to the aforesaid two offence in accordance with law. Feeling aggrieved by the said judgment and order of the Sessions Court, the complainant has preferred the aforesaid criminal misc. application No.1875/2002. There the complainant had contended that the learned Sessions Judge had committed error in holding that the offences punishable under section 447 and 427 of IPC require sanction and, therefore, that part of the judgment of the Sessions Court has been challenged in this petition by the original complainant. On the other hand, the accused persons have challenged the second part of the judgment and the order of the Sessions court in criminal revision application no.105/2002 stating that the learned Sessions Judge has committed an error in holding that no sanction was required for the offences punishable under section 504 and 506 of IPC.

4. Rule was issued in both the matters and learned Advocates for the parties have extended their arguments at length in both the matters. Since both the matters arise out of one and the same criminal case and the criminal revision Application, both the matters have been heard together. Mr N K Thakkar, learned Advocate has appeared on behalf of the original complainant in both the matters whereas Mr Mehul S Shah, learned Advocate has appeared on behalf of the accused persons in both the matters.

5. So far as the arguments advanced by the learned Advocate for the original complainant is concerned, Mr N K Thakkar has argued the matter at length stating that it was nowhere the function of the accused persons to demolish the structure and it was not the official duty of the accused persons to do so. For the said purpose, he has taken me through the provisions of section 105 of the Gujarat Panchayats Act, 1993 (for short, 'the Act'). This provision empowers the Panchayat to remove any illegal obstruction or construction. There is no serious dispute about the same. Mr Thakker has also drawn my

attention to sub-section (7) of section 105 of the said Act which reads as follows:

> "(7) Where the Panchayat finds it difficult to remove any obstruction or encroachment or any crop unauthorisedly cultivated on grazing lands as referred to in sub-section (2), it shall inform the Taluka Development Officer accordingly and the Taluka Development Officer shall on receipt of such information exercise the powers of the Panchayat under sub-section (2) and take action to remove the obstruction, encroachment or, as the case may be, the crop."

On the strength of this provision, it has been argued by Mr Thakkar that if a Gram Panchayat finds it difficult to remove any obstruction or encroachment etc., it has to inform the Taluka Development Officer about the same and the said officer, on receipt of the said information, would exercise the powers of the Panchayat in sub-section (2) to remove the obstruction or encroachment as the case may be. Mr Thakkar has, therefore, argued that in view of the provision of 105 (7), it is the duty of the Taluka Development Officer, who is the constituted authority to undertake steps for removal of obstruction or encroachment etc. It is, therefore, his argument that the Taluka Panchayat or members of the Taluka Panchayat have no statutory power, function or duty to be performed for the removal of the obstruction or encroachment etc. That therefore, the removal or encroachment, obstruction etc. by the office bearers of the Taluka Panchayat would not be treated to be their official function and, therefore, it would not be an act under the Act and consequently, it would not attract the provisions contained in section 197 of the said Code. On the other hand Mr Mehul Shah, learned Advocate for the original accused persons has heavily relied upon the provisions of section 197 in order to argue that the act in question required sanction of the Government. On a bare reading of sub-section (1) of section 197 of the Code, it is very clear that where any public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have committed by him while acting or purporting to act in the discharge of his official duty, then the Court cannot take cognizance of such an offence without previous sanction as stated in clauses (a) and (b) of subsection (1) of section 197 of the Code. Mr Mehul Shah, learned Advocate for the respondent has tried to argue that the accused persons are public servants within the meaning of section 272 of the said Act and, therefore, sanction is obligatory.

6. Again on a bare reading of sub-section (1) of 197 of the Code, it is clear that the sub-section does not refer only public servant but it further requires that such public servants must be removable from their office by or with the sanction of the Government. Mr Mehul Shah, learned Advocate was unable to point out any provision of the said Act under which the accused persons could be removed from their offices upon the sanction of the Government. Mr Mehul Shah has argued that the accused persons being the office bearers of the Taluke Panchayat, could be removed by the Development Commissioner. Now, the Development Commissioner is not a Government and it has not been shown that the Development Commissioner can act only on the sanction of the Government Act. In short, Mr Mehul Shah, learned Advocate for the accused persons could not show me a law requiring the removal of the accused persons from their present position by Government or under the sanction of the Government. In absence of any such provision of law shown to me, it is not possible for me to hold that the case of the accused persons stand governed by Section 197 of the Code. Therefore, in my opinion, the provisions contained in section of 197 of the said Code will not apply to the facts and circumstances of the case on hand, since it is not shown to me that the accused persons can be removed from their office by order or with the sanction of the Government.

7. Now we can turn to the provisions found in section 273 of the said Act which reads as follows:

> "273. When any person who is or had been a Sarpanch, Upa-Sarpanch, President or Vice-President of a Panchayat of a Chairman of the Education Committee of district is accused of any offence alleged to have been committed by him while acting or purporting to act the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction of the state Government or any officer authorised by the State Government in this behalf."

8. According to the above provision, the persons covered under section 273 are a Sarpanch, Upa-Sarpanch, President or the Vice President of a Panchayat. It is not much in dispute that at least two accused persons are President and Vice President of the Taluka Panchayat. Thereby these two officers would be governed by the provision of section 273 of the Act. It is not much in

dispute that the Taluka Panchayat has passed a Resolution stating that the complainant had committed violation of the terms and conditions of the allotment of land being non-acquisitioned land bearing survey No.267 and, therefore, the complainant was directed to remove himself from the said land. That the complainant did not get out of the same and, therefore, as per the Resolution of the Executive Committee of the Taluka Panchayat, the complainant should be removed from the said plot and, therefore, proper action be taken. The said resolution has been signed by the Chairman of the Executive Committee and also the Taluka Development Officer whose signatures appear at Sr.No.6. Then there is rojkam which shows that the measurements were taken in respect of the disputed land in presence of the office bearer/officers of Taluka Panchayat and even the Taluka Development Officer was also present and in his presence, measurements were taken and thereafter demolition proceedings were undertaken. A rojkama was prepared and it has also been signed by the Secretary of the Executive Committee of the Taluka Panchayat, who also happens to be the Taluka Development Officer. This would show that the demolition process was executed in presence of the Taluka Development Officer. The Learned Advocate for the original complainant has again drawn my attention to the provisions made in sub-section (7) of section 105 of the Act.

9. On referring to the said provision contained in sub-section (7) of section 105, Mr Thakkar, learned Advocate for the complainant has argued that if a Gram Panchayat finds it difficult to remove any obstruction or encroachment etc., then it has to inform the Taluka Development Officer and the Taluka Development Officer has to undertake the process of removal of such obstruction or encroachment. That therefore, the office bearers of the Taluka Panchayat do not come in picture so far as the removal of the structure is concerned. As against this Mr Mehul Shah, learned Advocate has argued for the original accused that the Taluka Development Officer will come in picture only when the Panchayat finds it difficult to remove any obstruction or encroachment etc. That in the present case, a resolution was passed by the Taluka Panchayat and the office bearers of the Taluka Panchayat were present at the time of removal of the obstruction or encroachment and, therefore, it was a function on their part under the said Act.

10. Now, if we look at the background, we may find that the provision contained in section 105 of the said

Act is there in Chapter V of the said Act. Its heading is "Conduct of business, Administrative Powers and Fund and Accounts etc. of Panchayats."

11. It shows that part I in Chapter V begins with the words "Provisions relating to village Panchayats" the provisions for removal or obstructions etc., are made in section 105 and it appears that the duty has been placed on the shoulder of the Village Panchayat with respect to the removal of the obstruction, encroachment etc. and if the Village Panchayat finds it difficult, it has to refer the matter to the Taluka Development Officer. It is not shown that the word "Panchayat" in sub-section (7) of Section 105 includes Taluka Panchayats. On a bare reading of section 105 of the said act, it appears that the word "Panchayat" relates to village Panchayat. Otherwise, there was no necessity for the reference to the Taluke Development Officer who happens to be the Secretary of Taluka Panchayat itself. Therefore, as per the scheme, if a village Panchayat finds it difficult to remove any obstruction etc., then it has to make a reference to the Taluka Development Officer and the Taluka Development Officer may remove the obstruction etc. in accordance with law. Moreover, in sub-section (8) of section 105 of the said Act, the Taluka Development Officer is also authorised to act as per sub-section (7) even suo-motu. Mr Thakkar has also argued on behalf of the complainant that the Taluka Development Officer was authorised to act under sub-section (7) and (8) of section 105 of the said Act. This means that the provisions of sub-section (7) and (8) and the proviso of sub-section (8) of section 105 of the said Act are required to be complied with.

12. Then we may turn to part II with a heading "Provisions relating to Taluka Panchayats". It begins with section 122. This shows that the provisions made in section 91 to 121 in the said Act relate to village Panchayats and section 105 is a part of that provision. This will further make it clear that the word "Panchayat" appearing in section 105 in the said Act, would relate to village Panchayat and not to Taluka Panchayat.

13. Section 109, 111, 116 and 117 of the Act, though form part of par I of the said Act, they specifically refer to Taluka Panchayat which also goes to suggest that the word "Panchayat" used in section 105 in the said Act as well as in section 91 to section 121 in the said Act relates to village Panchayats and not other Panchayats like Taluka and District Panchayats, since the Parliament seems to have used the words - Taluka

Panchayat-and-District panchayat in the first part whenever there was intention to make provision for application of relevant section of the first part of the said Act to such panchayats.

14. In other words, the word "Panchayat" appearing in section 105(7) of the said Act read with section 105 (2) thereof, stands for village Panchayats, which would show that the powers of removal of obstruction etc. have been conferred on village Panchayat and therefore, Taluka Panchayats would not come in picture for that purpose.

15. Once it is found that it is the duty of a village Panchayat to remove the encroachment etc. and when it is not shown from the said Act that such a duty is also not placed on Taluka Panchayats or on the members of the Taluka Panchayat, it is not possible to hold that the accused persons were discharging their duty while removing the alleged illegal structure.

16. So, the accused persons are not shown to be public servants who could not be removed from their office by or with the consent of the Government. Therefore, their case would fall outside the four corners of section 197 (1) of the said Code. The removal of obstruction/encroachment etc. is not shown to be the official duty or function of the accused persons in view of sub-section 2 and 7 of section 105 of the said Act, and hence the case would not fall within four corners of section 273 of the said Act.

17. The learned Sessions Judge seems to be in error in holding that the act complained of was a part of a statutory function/duty of the accused persons since the provision contained in section 273 of the said Act has not been taken into account by him. Same way, the learned Sessions Judge has also not properly appreciated the applicability of section 273 of the said Act and of section 197 of the said Code. The learned Sessions Judge has thus erred in confirming the order of the trial court by holding that the original accursed persons could not be tried without a valid sanction of the Government, for offences punishable under sections 447 and 427 of the IPC. Therefore, that part of his judgment and order is required to be interfered with by this court, by allowing Criminal Misc.Application No.1875.2002 of the original complainant.

18. At the same time, the learned Sessions Judge appears to be right in prima facie, holding that no sanction was necessary for the offences punishable under

sections 504 and 506 of IPC. The reason is that these offences are, to some extent by-product of other two offences under sections 447 and 427 of IPC. When Government sanction is not required, prima facie, for conducting the trial against the accused persons for offences punishable under sections 447 and 427 of IPC, no sanction would be prima facie, needed for offences punishable under section 504 and 506 of IPC. When demolition process is not prima facie found to be a part of the statutory power, function and duty of the accused persons, then there is no link, prima facie, between the statutory duty of the accused persons and the act complained of. Hence the accused would not, prima facie, get protection of section 273 of the said act. It is not an act under the Act, prima facie, nor is an act under purported exercise of statutory duty under section 273 of the said Act, prima facie.

19. This means that the accused are not entitled to protection under section 197 of the said Code or under section 273 of the said Act. The learned Advocate for the parties have not taken shelter of any provisions other than these two, i.e. section 197 of the said Code and section 273 read with section 105 of the said act.

20. The learned Magistrate has, thus committed an error in outright exonerating the accused persons from the offences punishable under section 504, 506, 427 and 447 of IPC. The learned Sessions Judge has committed error in partly disallowing the criminal revision application of the complainant with respect to the offences punishable under section 447 and 427 of IPC The learned Sessions Judge was justified, in view of the above discussion, in partly allowing the criminal revision application of the complainant with respect to the offences punishable under section 504 and 506 of IPC.

21. The learned Advocate for the complainant has also argued that this was a private complaint and the learned Magistrate has committed an error in exercising powers under section 258 of the said Code. True. The learned Magistrate has indicated in his order that the said order was passed in exercise of powers under section 258 of the said Code. It is also true that the said powers under section 258 could not be exercised in a private complaint since the powers under section 258 of the Code could only be exercised in summons case instituted otherwise than on complaint, meaning thereby that the powers under section 258 of the code could not be exercised in a complaint case.

22. At the same time, if there is any technical/legal bar against proceeding ahead with a summons case, even plea of the accused under section 251 may not be recorded and at that stage also, the accused can be acquitted, if the factual disputes are not required to be raised and dealt with and the issue could be decided only on the averments made in the complaint. The learned Magistrate was therefore, at liberty to decide if there was a legal bar against the prosecution of the accused.

22.1. In the case of P K Pradhan v. State of Sikkim (AI 2001 SC 2547) it has been laid down that for attracting the bar of section 197 of the said Code (and other similar technical bar) there must be a reasonable connection between the act complained of the official duty of accused persons. Similar view was taken even in AIR 1956 SC 44. This principle cannot be in dispute.

22.2. In Abdul Wahab v. State of Bihar (2000 Cr.L.J.(SC) 4631), it has been held that technical plea of sanction can be raised even before framing of charges. This principle is also not in dispute before me.

22.3. In re Ramachandran's case reported in 1980 Cr.L.J. 349 (Madras), the facts were different.

22.4. In the case of Aher Pola Parbat Barad v. Chituri Sahib S.P. Veraval & Ors. (2001 (2) GLH 222 also the facts were different.

23. Mr M S Shah, learned advocate for the original accused has raised an objection against maintainability of an application under section 482 of the said Code saying that it amounts to a second criminal revision application which is expressly barred under section 397 (3) of the said Code and in support of his argument, he has cited a decision of Dharampal v. smt.Ramshri (7.1.1993) reported in AIR 1993 SC 1361.

24. In reply thereto we may refer to a decision of Hon'ble the Supreme Court in P.K. Dey v. State of West Bengal, (2002) 3 SCC 630) wherein it has been clearly laid down that when second criminal revision is barred under section 397 (3) of the said Code, the High Court should exercise powers under section 482 of the said Code.

25. Mr Thakker has also referred to a Full Bench decision of this Court in Gujarat Housing Board v. Nagjibhai reported in 1985 (2) GLR 1190 wherein it has

been laid down that when two decisions of Hon'ble the Supreme Court rendered by the Hon'ble Judges of equal numbers, then subsequent decision will hold the field.

26. As stated above, the first decision cited by Mr Shah was rendered on 7.1.1993 whereas the second was rendered on 4.12.2000. Therefore, in view of the Full Bench decision of this Court referred to hereinabove, the subsequent decision cited by Mr Thakker is required to be followed and as per the subsequent decision, powers under section 482 of the Code can be exercised against the orders of Sessions Court passed in a Criminal Revision Application under section 397 of the said Code despite a bar under section 397 (3) of the said Code.

27. Even in S.G. Munia v. State of Gujarat (2002 (3) GLR 2507), it has been held (per A M Kapadia, J.) that section 397 (3) is not a blanket bar and the High Court would interfere when there is a gross miscarriage of justice. The learned Judge had referred to the decisions reported in AIR 1993 SC 1361 and also other subsequent decisions of 2002 AIR SCW 2035, 2000(10) SCC 337.

28. In the case on hand, it can be gathered that the accused had raised a plea that there was a technical and legal bar against the prosecution against them in view of section 197 of the said Code. This would come into picture only when the accused is removable from his office only by Government or upon sanction of Government. The accused are not found to be falling in this category.

29. The accused have also taken the shelter of section 273 (1) of the Act before this Court. Here also it is noticed that removal of obstruction/encroachment is not found to be the official duty/function of the accused and they do not fall within four corners of section 105 of the said act. Therefore, even for offences punishable under section 447 and 427 of IPC, the prosecution against them is not barred. Despite this legal position, two courts below have decided otherwise and have exonerated the accused persons at a very early stage before even recording of evidence. In my opinion, this has resulted in miscarriage of justice requiring interference of this Court by invoking inherent jurisdiction under section 482 of the code.

30. For the foregoing discussions and reasons the following order is passed:

(i) Misc.Criminal Application No.1875 of 2002

of the original complainant is allowed and the judgment and order dated 20.12.2001 in Criminal Revision Application No.42/1999 recorded by the learned Sessions Judge, Kachchh at Bhuj disallowing it partly with respect to the offence punishable under section 447 and 427 of the IPC are set aside. The trial court will naturally undertake trial of the case against the accused persons even with respect to these offences also in accordance with law.

(ii) Criminal Revision Application No.105/2002 filed by the original accused persons is ordered to be dismissed and the judgment and order of the learned Sessions Judge in Criminal Revision Application No.42/1999 partly allowing it for offences punishable under sections 504 and 506 of IPC, are confirmed.

(iii) The trial court will naturally proceed ahead with the trial in accordance with law.

(iv) Rule issued in Criminal Misc.Application No.1875 of 2002 is made absolute as indicated hereinabove.

(v) Rule issued in Criminal Revision Application No.105 of 2002 stands discharged.

(vi) Ad-interim relief granted earlier stands vacated.

[D P Buch, J.]

msp